

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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ROSCHEEM GRAY,

Petitioner,

v.

3: 05-cv-0222

UNITED STATES OF AMERICA,

Respondent.

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THOMAS J. McAVOY  
Senior United States District Judge

**DECISION and ORDER**

Petitioner moves for relief under 28 U.S.C. § 2255 based on United States v. Booker, — U.S. —, 125 S.Ct. 738 (2005). Petitioner's motion also implicates, albeit not expressly, consideration of Blakely v. Washington, — U.S. —, 124 S.Ct. 2531 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000). For the following reasons, Petitioner's motion is DENIED.

Booker does not apply retroactively to matters on collateral review, thereby precluding relief in this instance. See Green v. United States, 397 F.3d 101, 103 (2d Cir. 2005) (holding that neither Blakely nor Booker apply retroactively). Petitioner's reliance on Booker, therefore, affords him no relief.

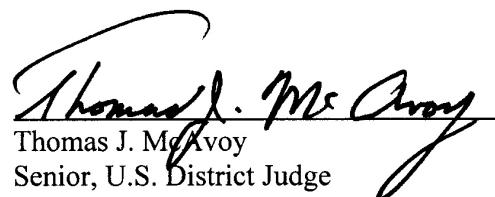
Petitioner's arguments under Apprendi and Blakely would also fail. Apprendi held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." 530 U.S. at 490. Here, Petitioner plead guilty to an indictment charging violation of 21 U.S.C. 846 for 50 or more grams

of crack cocaine. See Blakely, 124 S.Ct. at 2537 (“the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose on the basis of facts reflected in the jury verdict or *admitted by the defendant*” [emphasis added]). This places Petitioner’s statutory liability under 21 U.S.C. § 841(b)(1)(A)(iii), which sets a maximum penalty of life imprisonment. Petitioner’s term of imprisonment of 121 months obviously is below the statutory maximum. Apprendi is therefore inapplicable to the present case.

For the foregoing reasons, Petitioner’s motion is DENIED.

IT IS SO ORDERED.

Dated: May 2, 2005



Thomas J. McAvoy  
Senior, U.S. District Judge